United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

75-1080

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No. 75-1080
No. 75-1079
No. 75-1105
No. 75-1106
No. 75-1120
No. 75-1111
No. 75-1112

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF:

JOSEPH MOSES, A Grand Jury Witness, Docket No. 75-1080
JOSEPH BUSCAGLIA, A Grand Jury Witness, Docket No. 75-1079
LAWRENCE PANARO, A Grand Jury Witness, Docket No. 75-1105
GASPER BONA, A Grand Jury Witness, Docket No. 75-1106
FRANK MAMBRINO, A Grand Jury Witness, Docket No. 75-1120
ROBERT OLIVER, A Grand Jury Witness, Docket No. 75-1111
DECIMO CICERO, A Grand Jury Witness, Docket No. 75-1112

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA,

Appellee

On Appeal from the United States District
Court for the Western District of New York

RICHARD J. ARCARA
United States Attorney
Western District of New York
Attorney for Appellee.

JAMES W. GRESENS
Department of Justice Attorney
1 West Genesee Street, Suite 921
Buffalo, New York 14202

of Counsel.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Honorable John T. Curtin, District Judge

SUPPLEMENTAL BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

The Government's main brief in regard to these consolidated appeals has already been forwarded to this Court. In our main brief we made answer to the issues raised in the "Brief of

Grand Jury Witnesses-Appellants" which was submitted on behalf of five of the witnesses who are a part of this consolidated appeal.

Subsequent to the submission of the brief on behalf of the five Appellants, Appellant Joseph Moses (who was not on the main brief) has submitted a "Supplemental Brief of Grand Jury Witnesses-Appellants and Appendix". This brief raises two questions in addition to those covered in the Appellants' first brief. In this, the Government's "Supplemental Brief", we respond to the issues raised by Appellant Moses.

ADDITIONAL QUESTIONS PRESENTED

Appellant Moses has presented two questions, in addition to those raised by the other Appellants, for resolution by this Court:

(1) Whether the Ninth Amendment of the United States Constitution grants a broader right against self-incrimination than that granted by the Fifth Amendment?

(2) Whether it is necessary, when there is a grant of immunity, to simultaneously preserve independent evidence the Government may have against a witness?

STATEMENT OF FACTS

Appellant Moses states in his brief that he adopts the Statement of Facts contained in the main brief.

A R G U M E N T

POINT I

THE NINTH AMENDMENT PROVIDES NO RIGHT TO REMAIN SILENT WHICH THE APPELLANTS MAY INVOKE.

Under POINT I of Appellant Moses' brief it is argued that the Supreme Court's decision in Kastigar v. United States, 406 U.S. 441 (1972), was limited to a consideration of whether the immunity statute in question (18 U.S.C. Section 6002 [1970]) passed constitutional muster under the Fifth Amendment. The Appellant argues, therefore, that the possibility remains that Section 6002 is voided by the Ninth Amendment. This argument should be rejected.

(A) No General Right to Refuse to Testify Existed at Common Law and, Hence, None Was "Retained" by the Ninth Amendment.

In his brief, the Appellant states that two early statutes cited in Kastigar demonstrate that "the framers of our Constitution recognized a basic right not to have testimony compelled unless all threat of prosecution was removed."

The short answer to this is that no such "basic" right was established at common law or in the English or Colonial statutes. See 8 J. Wigmore, Evidence Section 2190 (J. McNaughton rev. 1961). Since no such "basic" right existed at the time our Constitution was enacted, it follows that it was not "retained" under the language of the Ninth Amendment.

(B) The Validity of the Immunity Statute Is Not Negated by the Ninth Amendment.

Under his POINT I, Appellant is asking this Court to declare that the federal immunity statute (18 U.S.C. Section 6002) is void under the "natural law" of the Ninth Amendment. This argument simply will not wash.

In Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798), Justice Iredell stated:

> "If, . . . the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideals of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

More recently, the District Court in United States v. Howe, 353 F.Supp. 419 (W.D. Missouri 1973), held that Section 1951 of Title 18 passed constitutional muster under the Ninth Amendment.

In short, there is simply no authority in law or in logic for the proposition that the grant of immunity to the Appellants runs afoul of the Ninth Amendment.

POINT II

THE GRANT OF IMMUNITY DOES NOT REQUIRE THAT ANY EVIDENCE WHICH THE PROSECUTION MAY HAVE AGAINST APPELLANTS BE "SEGREGATED AND PRESERVED".

In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court held that the same immunity statute (18 U.S.C. Section 6002) which Appellant now questions was valid under the Fifth Amendment because the "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege." (406 U.S. at 454.)

Nevertheless, Appellant argues that the immunity granted by the District Court is invalid because the Government was not required to "segregate and preserve" any evidence which it may have against the Appellants. The Appellant asserts that this should be done because "as the time between testimony and prosecution lenghthens, it becomes more difficult for the

defense to show that the source of the evidence is untainted." (emphasis added)

This argument misses the point which the Supreme Court in Kastigar went to great pains to elucidate: The burden of showing that a subsequent prosecution is based on independent evidence is on the Government not the defense. The Kastigar Court clearly held that:

> "A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in Murphy:
>
> > 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S., at 79 n. 18, 84 S.Ct., at 1609.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 461 (emphasis added)

The Supreme Court went on to state that imposing this burden on the prosecution amounts to "very substantial protection, commensurate with that resulting from invoking the privilege itself." Furthermore, the Court held that:

> "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 462-63 (emphasis added)

During oral argument in the District Court, counsel for Moses raised the question of whether his client could possibly be indicted at sometime after his appearance before the Grand Jury. The Special Attorney in charge of the investigation affirmed that Moses was considered to be a witness and was not a target of the investigation.[1] (Moses Record on Appeal, Exhibit 8, p. 31)[2] Gresens also affirmed as an "officer of the court and as an attorney for the government" that no attempt would be made to pass any information obtained from Moses' testimony to any other state or federal prosecutor. (Id., p. 31-32.)

* * *

To summarize, Kastigar has clearly established that a grant of immunity pursuant to Section 6002 is sufficient to supplant the privilege against self-incrimination. In each of

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1. Similar statements of the Government's intention may be found in the record of oral argument concerning the other witnesses.

2. This portion of the oral argument before the District Court does not appear in the Appendix which is attached to Appellant Moses' brief.

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GOVERNMENT'S AFFIDAVIT OF SERVICE

On Appeal from the United States District
Court for the Western District of New York

JAMES W. GRESENS, Special Attorney for the Department of Justice, being duly sworn in the manner provided by law, deposes and states that on April 5, 1975 he personally deposited in the United States Mail one copy of the BRIEF FOR THE UNITED STATES OF AMERICA and a SUPPLEMENTAL BRIEF thereto addressed to each of the Appellants' attorneys as listed below:

MARTOCHE, COLLESANO, ABRAMOWITZ
& GELLER
PHILIP B. ABRAMOWITZ
Attorney for Appellant-Buscaglia
Office and P.O. Address
76 Niagara Street
Buffalo, New York 14202

NATHAN SEEBERG
Attorney for Appellant-Panaro
Office and P.O. Address
630 Walbridge Building
43 Court Street
Buffalo, New York 14202

ROBERT M. MURPHY
Attorney for Appellant-Bona
Office and P.O. Address
727 Ridge Road
Lackawanna, New York 14218

THIELMAN & LALIME
JAMES L. LALIME
Attorney for Appellant-Mambrino
Office and P.O. Address
1710 Liberty Bank Building
Buffalo, New York 14202

STEPHEN R. LAMANTIA
Attorney for Appellant-Oliver
Office and P.O. Address
816 Prudential Building
Buffalo, New York 14202

HELLER AND RAMM
JULIUS M. RAMM
Attorney for Appellant-Moses
Office and P.O. Address
1330 Statler Hilton Hotel
Buffalo, New York 14202

JAMES P. HARRINGTON
Attorney for Appellant-Cicero
Office and P.O. Address
474 Statler Hilton
Buffalo, New York 14202

The foregoing is true and correct to the best of my knowledge.

James W. Gresens

JAMES W. GRESENS
Special Attorney
U.S. Department of Justice

Sworn to Before Me

This 5th Day of April, 1975.

Alice A. Monaco

ALICE A. MONACO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 76

the Appellants' cases the Government represented to the District Court that each Appellant was considered to be a "witness" rather than a target of the probe. If any of the Appellants felt that they had committed crimes for which they might later be indicted, surely the wisest course would have been to appear before the Grand Jury, testify fully about these crimes and receive immunity from further prosecution. Instead, the Appellants remained silent claiming, inter alia, that they fear indictment. We submit that this completely speculative fear -- which the immunity statute provides protection against -- does not constitute "just cause" under Section 1826 of Title 28.

The contentions under POINT II of Appellant Moses' brief should be rejected.

CONCLUSION

For the reasons stated above, the orders of the District Court remanding the Appellants pursuant to Section 1826 of Title 28 should be upheld.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney
Western District of New York
Attorney for the United States
of America.

JAMES W. GRESENS
Special Attorney
United States Department of Justice

of Counsel.